SUBJECT INDEX

PETITION

	Page
Summary Statement of the Matter Involved	1
Jurisdictional Statement	2
The Question Presented	5
Reasons Relied Upon for Allowance of Writ	5
Prayer for Writ	6

BRIEF

The Opinion Below	8
Jurisdiction	8
Statement of the Case	9
Specifications of Errors	9
Argument	10
Summary of the Argument	10
Point I	12
Point II	14
Point III	16
Point IV	18
Point V	19
Point VI	20
Conclusion	22

TABLE OF CASES AND AUTHORITIES

Bailey v. Bass, 172 Fed(2) 212 8

Bonsils v. Gillespie, 139 Pac. 1054 13

Brown v. Van Braam, 3 Dallas 344 ..... 4, 15

Chandler v. Peketz, 297 U. S. 609 13

Dimond v. Marwell, 190 Atl. 683 17

Flanders v. Ostrom, 187 N.E. 673 21

Globe and Republic Insurance Company v. Shields, 96 S.W.(2) 947 ..... 5, 19, 20

Grannis v. Ordean, 58 L.Ed. 1363 21

Griffin v. Griffin, 327 U. S. 220 3

Halligan v. Carlson, 135 Atl. 39 15

Jordan v. Texas and Pacific Coal & Oil Company, 150 S.W.(2) 875 ..... 5, 19

Klapprott v. U. S. 17 U.S.L.W. 4118, 4123 3,20

Maxwell v. Stewart, 88 U. S. 71 ..... 3, 14

Peitzman v. City of Illmo, 141 Fed.(2) 956 ..... 4, 17

Pena v. Bourland, 72 Fed. Supp. 290 5,19

Peters v. Sturmer, 248 N.W. 875 16

Switzer v. Smith, 300 S.W. 31 19

U. S. Ex Rel Knupfer v. Watkins, 159 Fed.(2) 675 ..... 2, 6, 12

United States v. Borchers, 163 Fed.(2) 347 ..... 2, 6, 13

United States v. Gayle, 45 Fed. 107 21

OTHER AUTHORITIES

31 Am. Jur. Section 589 20

46 Columbia Law Review 637 21

49 Corpus Juris Secundum p. 586 16

7 Cyclopedia of Federal Procedure Se. 3255 17

Federal Rules of Civil Procedure, Rule 12(c) 2

Federal Rules of Civil Procedure, Rule 55 ..... 6, 18

Federal Rules of Civil Procedure, Rule 55(a) 4, 16

Federal Rules of Civil Procedure, Rule 55(b) 16, 22

Federal Rules of Civil Procedure,
Rule 55(b)(2) 2, 4, 9, 11, 12, 16

1 Freeman on Judgments (5th Ed.) Sec. 388 ..... 5, 18

3 Moore's Federal Practice, page 3186 16

Supreme Court Rule 38(5)(b) 2, 3, 4, 9

TABLE OF STATUTES CITED

United States Code, Title 28, Section 1254 ..... 2, 8

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1948

No.————————

EDNA PEARL BAILEY,

Petitioner and Appellee Below

v.

B. F. BASS,

Respondent and Appellant Below

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support of Petition.

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner instituted suit in the District Court on a Judgment rendered by the United States District Court for the District of Kansas, Second Division, it being alleged that the Court rendering the Judgment had jurisdiction of the parties and the subject matter and that the Judgment remained in full force and effect, in no wise satisfied, recovered or annulled. (R. 1-3). Respondent plead, among other things,

that various procedural errors committed by the District Court rendering the Judgment amounted to a deprivation of due process. (R. 3-7). Petitioner, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, filed a Motion for Judgment on the Pleadings on the ground that respondent's defenses did not constitute a legal defense to an action based upon a judgment rendered by a Court of general jurisdiction admittedly having jurisdiction of the subject matter and the parties, and that the grounds of defense outlined in respondent's answer constituted a collateral attack upon a Judgment regular upon its face. (R. 8-9).

The District Judge entered Judgment for Petitioner on the Motion for Judgment on the Pleadings. (R. 12). Respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit (R.13-17), which by an opinion dated January 18, 1949, set aside the Judgment of the District Court and remanded the cause for further proceedings. The opinion then filed was written by Circuit Judge Sibley, with the concurrence of Circuit Judge McCord (R. 20-31). Presiding Judge Hutcheson dissented. (R. 31-34). Petition for Rehearing was denied on February 28, 1949, presiding Judge Hutcheson dissenting (R. 40). The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (1948), 28 U.S.C., Sec. 1254.

JURISDICTIONAL STATEMENT

I.

It is contended that the Supreme Court has jurisdiction to review the Judgment herein questioned because the "Circuit Court of Appeals has rendered a decision in conflict with the decision(s) of another Circuit Court of Appeals on the same matter," (Supreme Court Rule 38, para. (5)(b)), the Circuit Court in the instant case holding that the failure to give the three day's notice of the Application for Default Judgment as prescribed by Rule 55(b)(2) amounted to a deprivation of due process, the United States Circuit Court of Appeals for the Second Circuit in the cases of *U. S. Ex Rel Knupfer v. Watkins*, 159 Fed.(2) 675 (1947), and *United*

States v. Borcher, 163 Fed.(2) 347 (1947, Certiorari denied, 332 U. S. 811) holding that the failure to give the defendent the "three days notice of application for judgment was at most only procedural and not jurisdictional." Although statements in the opinions of the Justices of this Court have made it clear that "due process does not require that notice of suit be given more than once" (Opinion of Justice Rutledge in *Griffin v. Griffin*, 327 U. S. 220 (1946)), and that service of process "places on the party to whom it is directed the responsibility to appear and defend or face the consequences" (Opinion of Justice Reed in *Klapprott v. U. S.*, 17 U.S.L.W. 4118, 4123 (1949)), this Court has never decided what the effect is of failure to give this notice, the Second Circuit holding that failure to do so is only "a procedural error" and the Fifth Circuit holding that failure to give the notice deprives a defaulting party of due process.

II.

This Court also has jurisdiction of this case because the Circuit Court "has decided a Federal question in a way probably in conflict with applicable decisions of this Court." (Supreme Court Rule 38, para. (5)(b)). Prior to the Respondent's default in the suit in Kansas, Petitioner requested a jury. When the cause came on for trial, in view of Respondent's default the Court heard the case without a jury. The Circuit Court held that the Court's action in so doing was an unconstitutional abuse of power, thus subjecting the judgment to a collateral attack when sued upon in another Federal Court.

The Circuit Court's ruling in this respect is in conflict with applicable decisions of this Court. At a time when the pertinent rules required the filing of a stipulation waiving a jury in order for the Court to try a case without a jury, this Court in the case of *Maxwell v. Stewart*, 88 U. S. 71 (1875), in response to the argument that the Judgment sued upon in the United States District Court "was void because the cause was tried by the Court without the Waiver of a trial by Jury," held that "a trial by the Court without waiver

of a jury is at most only error." Another decision to the same effect by this Court is *Brown v. Van Braam*, 3 Dallas 344 (1797).

III.

This case involves "an important question of Federal law, which has not been, but should be, settled by this Court." (Supreme Court Rule 28, para. (5)(b)). Rule 55(a) of the Federal Rules of Civil Procedure provides that "a party against whom a judgment for affirmative relief is sought" is in default upon failure "to plead or otherwise defend." Rule 55(b)(2) specifies the procedure for the entry of a default judgment against a party who "has appeared in the action." In the instant case the majority of the Circuit Court held that as the respondent filed an answer in the proceeding in Kansas "the Judge could not enter a default against him." This Court has never decided whether a default judgment may be taken against a party who has appeared in action, but who fails to "otherwise defend." It is true that inferior Federal Courts have held that a Court may properly strike a defendant's answer because of his failure to give his deposition, or to serve answers to interrogatories, thereafter entering a default judgment against him, but such decisions are not controlling. For example, see *Peitzman v. The City of Illmo*, 141 Fed.(2) 956 (CCA 8, 1944, Certiorari denied, 323 U. S. 718, Rehearing denied, 323 U. S. 813).

IV.

As the Judgment sued upon was regular on its face and contained an express recital that the Court rendering the Judgment heard evidence and arguments of counsel, the majority of the Circuit Court in permitting the respondent to collaterally attack the Judgment on the ground that the Judgment was taken without the hearing of evidence "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Courts power of supervision." (Supreme Court Rule 38, para. 5(b).

The Circuit Court in the instant case admitted that it was "settled law" that express recitals of a Judgment rendered by a Court having jurisdiction of the subject matter and the parties could be overcome only by reference to the record itstlf. However, the Circuit Court, departing from the accepted and usual course of judicial proceedings in both the Federal Courts and the Courts of the various states, permitted the appellant to collaterally attack the judgment sued on upon the ground that no evidence was heard by the Court rendering the Judgment, this, despite the fact that the Judgment itself contained an express recital that the Court heard evidence and argument of counsel and there was nothing contradictory to such recital anywhere in the Record. This generally accepted rule that a recital in a judgment of a court of general jurisdiction is, upon a collateral attack, conclusive, and not subject to impeachment has been applied in the instance of attacks on the ground that the defendant was not served with process, *Jordan v. Texas and Pacific Coal and Gas Company*, 152 S.W.(2) 875 (Amarillo Civil Appeals, 1941, writ of error refused); *Pena v. Bourland*, 72 Fed. Supp. 290, 294 (1947); and *1 Freeman on Judgments* (5th Edition) Section 388, as well as in instances in which a Judgment has been attacked on the ground that the evidence upon which the Judgment was based was false and fraudulent, or that the Judgment was rendered without the hearing of any evidence. *Globe and Republic Insurance Company v. Shields*, 96 S.W.(2) 947 (Tennessee Supreme Court, 1936), and *31 Am. Jur. Sec. 589.*

THE QUESTION PRESENTED

The questioned presented in this case is whether a Judgment regular upon its face rendered by a Court of general jurisdiction, the United States District Court for the District of Kansas, Second Division, admittedly having jurisdiction of the subject matters and of the parties is subject to collateral attack because of procedural errors committed by the Court rendering the Judgment.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decison of said Circuit Court of Appeals is in con-

flict with the decisions of the Circuit Court of Appeals for the Second Circuit on the same matter, in the cases of *U. S. Ex Rel Knupfer v. Watkins*, 159 Fed.(2) 675 (1947) and *United States v. Borchers*, 163 Fed.(2) 347 (1947, Certiorari denied, 332 U. S. 811).

2. The decision of said Circuit Court of Appeals as to the failure of the District Court rendering the Default Judgment to try the cause to a jury, the Petitioner having requested a jury prior to Respondent's default, by holding that the trial of the cause by the Court without a jury, the defendant being in default, was a denial of due process under the Fifth Amendment, is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

3. The decision of the Circuit Court of Appeals as to the effffect of Rule 55 of the Federal Rules of Civil Procedure, by holding that the Respondent having answered, a default could not be taken against him despite his failure to "otherwise defend", involves an important question of Federal law which has not been, but should be, settled by this Court.

4. The decision of said Circuit Court of Appeals as to the conclusiveness of express recitals in a judgment regular upon its face rendered by a Court of general jurisdiction, by holding that such recitals may be overcome by matters completely outside the record, so far departs from the accepted and usual course of pudicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket No. 12395, B. F. Bass, Appellant, v. Edna Pearl Bailey Apellee, to the end that this cause may be reviewed

and determined by this Court as provided for by the statutes of the United States; and that the Judgment herein of said United States Circuit Court of Appeals for the Fifth Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

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Dallas, Texas
May 23, 1949.

No.————————

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1948

EDNA PEARL BAILEY,
Petitioner and Appellee Below

v.

B. F. BASS,
Respondent and Appellant Below

Brief in support of Petition for Writ of Certiorari.

THE OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 172 Fed.(2) 212. This Opinion is also printed in full in the Record (R. 20-34). The decree of the United States District Court for the Eastern District of Texas, Sherman Division, is printed in full in the Record (R.12).

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, (1948), 28 U.S.C. Sec. 1254.

1. The Circuit Court of Appeals has in this case "rendered a decision in conflict with the decision of another Cir-

cuit Court of Appeals on the same matter." (Supreme Court Rule 38(5)(b)).

2. The Circuit Court of Appeals has in this case "decided a Federal question in a way probably in conflict with the applicable decisions of this Court." (Supreme Court Rule 38(5)(b)).

3. The Circuit Court of Appeals has in this case "decided an important question of Federal law which has not been, but should be, settled by this Court." (Supreme Court Rule 38(5)(b)).

4. The Circuit Court of Appeals has in this case "so far departed from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this Court's power of supervision." (Supreme Court Rule 38(5)(b)).

Judgment was rendered in this case by the United States Circuit Court of Appeals on January 18, 1949 (R. 39), and Petition for Rehearing was denied on February 28, 1949 (R. 40).

STATEMENT OF THE CASE.

This has already been stated in the preceding Petition for Certiorari (pp. 1), which is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERRORS

1. The majority of the Court erred in holding, contrary to the decisions of the Second Circuit, that the failure to give the respondent three days notice of the application for default judgment as required by Rule 55(b)(2) of the Federal Rules of Civil Procedure deprived respondent of due process of law.

2. The majority of the Court erred in holding that the failure of the Federal District Court rendering the Judgment sued upon to try the cause to a jury, the Petitioner having requested a jury prior to the Respondent's default, deprived Respondent of due process, thus rendering the Judgment against him void and subject to collateral attack when sued

upon in another Federal District Court, the Court's decision on this Federal question being in "conflict with the applicable decisions of this Court."

3. The majority of the Court erred in holding that, respondent having answered, a default judgment could not subsequently be taken against him pursuant to Rule 55 when he completely failed to "otherwise defend" the suit against him, the Circuit Court in this connection deciding "an important question of Federal law which has not been, but should be settled by this Court."

4. As the Judgment sued upon was regular on its face, was rendered by a Court of general jurisdiction and contains an express recital that the Court heard evidence and argument of counsel, the Court erred and departed from the accepted and usual course of judicial proceedings in permitting the respondent to collaterally attack his judgment on the ground that the judgment was taken without the hearing of evidence.

5. The Court erred and departed from the accepted and usual course of judicial proceedings in holding that the judgment sued upon was void because the Court rendering the judgment failed to hear any evidence to establish liability on the part of the respondent or to prove the nature and extent of the injuries suffered by the Petitioner.

6. The Court erred in holding that the rendition of a Judgment by a Court admittedly having jurisdiction of the parties and the subject matter without the hearing of evidence deprived Respondent of due process of law.

ARGUMENT

Summary of the Argument

I.

The failure to give Respondent three days' notice of the hearing on the Application for a Default Judgment as pro-

vided for by Rule 55(b)(2) was "at most only procedural," and does not render the judgment void so as to subject it to a collateral attack when sued upon in another Federal Court, nor does the failure to give this notice deprive the respondent, admittedly before the Court and charged with notice of all subsequent developments, of due process.

II.

A default judgment regular upon its face, rendered by a Court of general jurisdiction having jurisdiction of the parties and of the subject matter is not subject to collateral attack on the ground that the case was tried by the Court without a jury, nor does the failure to submit such a case to a jury upon the entry of a default judgment deprive the defaulting party of any rights guaranteed by the Constitution.

III.

The express provisions of the Federal Rules, as well as decisions of the Federal Courts, make it clear that the mere fact that a party has appeared in a suit does not preclude the entry of a default judgment against him in the event of his failure to "otherwise defend as provided by these rules."

IV.

Express recitals in a judgment regular upon its face, rendered by a Court of general jurisdiction, admittedly having jurisdicition of the subject matter and of the parties, cannot be impeached upon a collateral attack by evidence outside the record.

V.

A judgment rendered by a Court of general jurisdiction admittedly having jurisdiction of the parties and of the subject matter is not void because of the failure of the Court rendering the Judgment to hear any evidence to establish liability on the part of the respondent or to prove the nature and extent of the injuries suffered by the petitioner.

VI.

A defendant, admittedly served with process and before the Court is not deprived of due process because of the failure of the Court, upon the entry of a default judgment, to hear evidence.

POINT I.

THE FAILURE TO GIVE RESPONDENT THREE DAYS NOTICE OF THE HEARING ON THE APPLICATION FOR A DEFAULT JUDGMENT AS PROVIDED FOR BY RULE 55(b)(2) was "AT MOST ONLY PROCEDURAL," AND DOES NOT RENDER THE JUDGMENT VOID SO AS TO SUBJECT IT TO A COLLATERAL ATTACK WHEN SUED UPON IN ANOTHER FEDERAL COURT, NOR DOES THE FAILURE TO GIVE THIS NOTICE DEPRIVE THE RESPONDENT, ADMITTEDLY BEFORE THE COURT AND CHARGED WITH NOTICE OF ALL SUBSEQUENT DEVELOPMENTS, OF DUE PROCESS.

The majority in the Circuit Court admit that Respondent's attack on the Judgment sued on in the instant case constitutes a collateral attack on the judgment, and that as the Court rendering the judgment admittedly had jurisdiction of the subject matter and of the parties, the judgment cannot be collaterally attacked because of irregularities or errors on the part of the Court rendering the judgment. However, the Court, in conflict with two decisions rendered by the United States Circuit Court of Appeals for the Second Circuit held that the failure to give respondent three days' notice of the hearing on the application for default judgment deprived respondent of due process. In the case of *U. S. Ex Rel Knupfer v. Watkins*, 159 Fed.(2) 675 (1947) the plaintiff instituted an action for a writ of habeas corpus alleging that a denaturalization judgment entered against him was void because of the failure to comply with this rule, the petitioning party in the denaturalization proceeding filing "an answer denying the allegations of the complaint and praying that it be dismissed." The Circuit Court of Appeals

for the Second Circuit held that the failure to comply with this Rule and give the three days' notice was only " a procedural error", the Court having jurisdiction of the defendont and the subject matter, and affirmed the District Courts decision refusing to permit an attack on the denaturalization proceeding on this ground.

In a subsequent consoldiated case, *United States v. Borchers*, 163 Fed.(2) 347 (1947), the Second Circuit again held that the failure to give the defendant the "three days' notice of application for judgment was at most only procedural and not jurisdictional." This Court denied Certiorari in this case on October 27, 1947, 332 U. S. 811.

In the case of *Bonsils v. Gillespie*, 139 Pacific, 1504 (Court of Appeals of Colorado, 1914), the plaintiff brought suit in Colorado on a Nevada judgment, and the defendant attacked the Nevada judgment on the ground that the trial resulting in the judgment against him in the Nevada Court "was without notice to him or to his attorneys, and that the plaintiff therein and his attorneys knew when said judgment was obtained that he (the defendant) was not indebted as claimed by them." The Court summarily disposed of the defendant's contention that this constituted a valid defense to the suit on the judgment, pointing out that the defendent admitted service upon him, appearance, non-payment of the judgment and that the Court in Nevada was a Court of record, holding that "this effectively disposes of the question of jurisdiction as to the person and subject matter, and of the existence of the judgment unsatisfied in the Nevada Court." A comparable decision of this Court is the case of *Chandler v. Peketz*, 297 U. S. 609 (1936), where the Court refused to permit a collateral attack on a judgment because of the failure of the Court which rendered the judgment to designate a hearing within the period prescribed by Statute.

Although the above discussed decisions, including the decisions of the United States Circuit Court of Appeals for the Second Circuit, make it abundantly clear that the failure to give this notice is "at most only procedural and not juris-

dictional", this Court has never decided what the effect is of the failure to give the prescribed three-day notice. Although opinions of the Justices of this Court have made it clear that "due process does not require that notice of suit be given more than once", and that service of process "places on a party to whom it is directed the responsibility to appear and defend or face the consequences", they are not controlling, and in view of the conflict between the decisions of the Second Circuit and the decision of the Fifth Circuit in the instant case, the Supreme Court should grant certiorari.

POINT II.

A DEFAULT JUDGMENT REGULAR UPON ITS FACE RENDERED BY A COURT OF GENERAL JURISDICTION HAVING JURISDICTION OF THE PARTIES AND OF THE SUBJECT MATTER IS NOT SUBJECT TO COLLATERAL ATTACK ON THE GROUND THAT THE CASE WAS TRIED BY THE COURT WITHOUT A JURY, NOR DOES THE FAILURE TO SUBMIT SUCH A CASE TO A JURY UPON THE ENTRY OF A DEFAULT JUDGMENT DEPRIVE THE DEFAULTING PARTY OF ANY RIGHTS GUARANTEED BY THE CONSTITUTION.

In the case of *Maxwell v. Stewart*, 88 U. S. 71 (1875), suit was filed in the District Court of New Mexico upon a judgment rendered by a Court of Record of the State of Kansas. The defendant contended that the judgment of the Kansas Court was void because the case was tried by the Court without the waiver of a trial by jury, the applicable rule requiring that a case be tried to a jury unless a stipulation be filed waiving a jury. On appeal to this Court it was held as follows:

> "Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error and cannot be taken advantage of collaterally."

On rehearing, the Court reiterated that:

> "A trial by the Court without waiver of a jury is at most only error."

In the case of *Brown v. Van Braam*, 3 Dallas 344 (1797), suit was instituted in the Circuit Court against two defendants, one of the defendants coming into Court, and after suggesting the death of the other defendant, "pleaded the general issue". The plaintiff thereupon prayed for pudgment against the surviving defendant, and "there being no joinder in issue, continuance, or other pleadings," the Court proceeded to enter a default judgment against the surviving defendant, the Court itself hearing the evidence as to the amount of damages to be assessed against the defendant. Upon appeal to this Court, the appellant contended that the damages should have been assessed by a jury and not by the Court, the appellee contending that a defaulting party was not entitled to a trial by jury on the question of damages. This Court in a per curiam decision affirmed the Circuit Court which had refused to refer the question of damages to the jury.

That the decision of the Circuit Court in this connection is in conflict with the decisions of the Courts of the several states, as well as being in conflict with the decisions of this Court, is apparent from an examination of the decisions. For example, in the case of *Halligan v. Carlson*, 135 Atl. 39 (Supreme Court of Conecticut, 1926), plaintiff brought suit to foreclose a judgment lien based upon a judgment secured by him against the defendant. The defendant was duly served in the original action and appeared by counsel. Subsequently, as in the instant case, the defendant's counsel was permitted by the Court to withdraw, and no further appearance being filed, a default was entered against the defendant. The plaintiff prior to the defendant's default had requested a jury, and when "the case was reached for trial, the trial judge suggested that, in view of the defendant's failure to appear, the hearing be to the court instead of to the jury; to this the

plaintiff agreed, and that course was pursued." The defendant sought "to prevent the foreclosure of the lien upon the ground that the trial court had no right to hear the original action without a jury." The Court rather summarily disposed of this contention pointing out that "the sufficient answer to his claim is that the error, if there was one, was not such as could be made of avail in a collateral attack upon the judgment." The Michigan Supreme Court in the case of *Peters v. Sturmer*, 248 N.W. 875 (1933), reached the same conclusion in a comparable case. In 3 Moore's Federal Practice, page 3186, the general rule is announced as follows:

> "A party who is in default does not have a constitutional right to a trial by jury on the question of damages."

See also 49 Corpus Juris Secundum, p. 586.

The decision of the Fifth Circuit in the instant case is in conflict with the above discussed decisions of this Court, as well as the other authorities discussed above.

POINT III.

THE EXPRESS PROVISIONS OF THE FEDERAL RULES, AS WELL AS DECISIONS OF THE FEDERAL COURTS, MAKE IT CLEAR THAT THE MERE FACT THAT A PARTY HAS APPEARED IN A SUIT DOES NOT PRECLUDE THE ENTRY OF A DEFAULT JUDGMENT AGAINST HIM IN THE EVENT OF HIS FAILURE TO "OTHERWISE DEFEND AS PROVIDED BY THESE RULES."

In view of the express provisions of Rule 55(a) and Rule 55(b), the mere fact that respondent filed an answer in the proceedings in the United States District Court in Kansas did not prevent his being in default by reason of his failure to "otherwise defend" the suit against him. Rule 55(a) provides that "a party against whom a judgment for affirmative relief is sought" is in default upon failure "to plead or otherwise defend." Rule 55(b)(2) provides the procedure for the entry of a default judgment against a party who "has ap-

peared in the action", thus making it clear that the mere fact that a party has appeared in the suit does not preclude the entry of a default judgment against him in the event of his failure to "otherwise defend as provided by these rules." The effect of the failure of a defendant who has appeared and answered to "otherwise defend" is "an important question of Federal law which has not been, but should be settled by this Court", especially in view of the holding of the Circuit Court in the principal case that once a defendant has answered and appeared, a default judgment cannot be taken against him despite his failure to "otherwise defend" the action. Prior to the instant decision, it seemed clear that the mere fact that a defendant appeared and answered did not prevent the entry of a default judgment against him in event of his failure to "otherwise defend", but the decision of the Fifth Circuit in the instant case leaves the interpretation of this important rule in such a state of uncertainty that it should be settled by this Court.

Earlier cases in which default judgments were entered against defendants who have appeared but have failed to "otherwise defend" are collected in Section 3255 of 7 Cyclopedia of Federal Procedure. In one of these cases, *Peitzman v. City of Illmo*, 141 Fed.(2) 956 (CCA 8, 1944, Certiorari denied 323 U. S. 718, Rehearing denied 323 U. S. 813), the Court held that the trial court under the Federal Rules may property strike a defendants answer and counterclaim and enter a default judgment against him because of his failure to give his deposition, thus making it clear that the mere fact that the defendant had filed an answer does not preclude the entry of a default judgment. A typical State Court decision is the case of *Dimond v. Marwell*, 190 Atl. 683 (Rhode Island Supreme Court, 1937), in which case the defendant filed an answer, but on "Motion for Summary Judgment he failed to appear on the day set for hearing on the plaintiffs motion and did not otherwise offer any defense for the consideration of the Court." The Court in this case quoted with approval from an earlier decision of the Rhode Island Supreme Court as follows:

"A defendant is in default if he omits to answer an action commenced against him. He is also in default if, having answered, he neglects to appear at the time fixed for trial and make his defense."

The Circuit Court of Appeals construed Rule 55 to mean that a default judgment cannot be taken against a party who appears and answers in a cause but who otherwise fails to defend the cause against him. This Court has not as yet construed this phase of this important rule, but should now do so because of the confusion resulting from the instant decision.

POINT IV.

EXPRESS RECITALS IN A JUDGMENT REGULAR UPON ITS FACE, RENDERED BY A COURT OF GENERAL JURISDICTION, ADMITTEDLY HAVING JURISDICTION OF THE SUBJECT MATTER AND OF THE PARTIES, CANNOT BE IMPEACHED UPON A COLLATERAL ATTACK BY EVIDENCE OUTSIDE THE RECORD ITSELF.

The judgment sued upon in this case contains an express recital that evidence was introduced and argument of counsel heard (R. 10). The Circuit Court in the instant case stated that it is "well settled law" (R. 25) that the express recitals of a judgment "import verity" (R. 25), and that "where the judgment is silent, * * * all presumptions are in favor of its regularity" (R. 25), it being possible to overcome such presumptions and express recitals only by reference to the Record. However, the Court, completely departing from the long-accepted and usual course, permitted the Respondent to overcome the express recitals concerning the hearing of evidence by going completely outside the Record itself. "The accepted and usual course of judicial proceedings" in both the Federal and State Courts has been that express recitals in a judgment of a court of general jurisdiction are conclusive and import absolute verity, and are not subject to impeachment. After stating the general rule that a recital in a judgment of a court of general jurisdiction as to the service of process is, upon a collateral attack, conclusive, and not subject to impeachment, in Section 388 of 1 Freeman On Judgments (5th

Ed.), it is pointed out that "the presumption extends to every step in the process and embraces every fact or matter going to the authority of the Court to render the judgment assailed." A Federal case so holding is *Pena v. Bourland*, 72 Fed. Supp. 290 (Dis. Ct. So. Dis. of Texas, 1947), where it was held as follows:

> "The recitation in the judgment that they were duly cited could not be collaterally attacked because such recitation imports absolute verity."

In the case of *Globe and Republic Insurance Company v. Shields*, 96 S.W. (2) 947 (Tennessee Supreme Court, 1936), the petitioner insisted that the judgment in question was void because the Chancellor heard no proof, and the Court held as follows:

> "The decree recites that the cause was heard 'upon oral proof of witnesses produced in open court.' The decree imports absolute verity, and its recitations are not open to contradicition on collateral attack."

In fact, in Texas it is well established that recitations in judgments, including the recitations concerning the serving of process, import absolute verity and canot be contradicted by other evidence, whether such evidence is in the record or otherwise. *Switzer v. Smith*, 300 S.W. 31 (Tex. Com. of App., 1927) and *Jordan v. Texas and Pacific Coal & Oil Company*, 150 S.W.(2) 875 (Amarillo Court of Civil Appeals, 1941, writ of error refused).

The Circuit Court in the instant case completely departed from the "accepted and usual course of judicial proceedings" in this respect, and because of the importance to the Federal Practice of not permitting collateral attacks on express recitations of judgments of other Federal Courts, this Court should exercise supervisory power.

POINT V.

A JUDGMENT RENDERED BY A COURT OF GENERAL JURISDICTION ADMITTEDLY HAVING JU-

RISDICTION OF THE PARTIES AND OF THE SUBJECT MATTER IS NOT VOID BECAUSE OF THE FAILURE OF THE COURT RENDERING THE JUDGMENT TO HEAR ANY EVIDENCE TO ESTABLISH LIABLITY ON THE PART OF THE RESPONDENT OR TO PROVE THE NATURE AND EXTENT OF THE INJURIES SUFFERED BY THE PETITIONER.

Even if the judgment sued upon was entered without the hearing of any evidence to establish liability on the part of the respondent or to prove the nature and extent of the injuries suffered by the Petitioner, nonetheless it is well established that the failure of the Court to hear such evidence does not render the judgment void so as to subject it to a collateral attack. That such is the general rule is made abundantly clear by Justice Reed in his opinion in the recent case of *Klapprott v. U. S.*, 17 U.S.L.W. 4118, 4123 (1949) which case involves a *direct* attack on a denaturalization decree. After considering the necessity of presenting evidence in uncontested denaturalization proceedings, it is pointed out that the "general rule in Civil actions is that none is necessary."

In the case of *Globe and Republic Insurance Company v. Shields, supra*, the Tenessee Supreme Court after pointing out that the recitals in the judgment as to the hearing of evidence imported absolute verity and were not subject to collateral attack, went on to point out that "if the decree had been supported by no proof it would have been erroneous and not void, the Court having jurisdiction of the parties and the subject matter of the suit." Or as stated in Section 589 of 31 Am. Jur.: "A judgment of a court of competent jurisdiction may not be collaterally attacked on the ground that it was rendered * * * without any evidence."

POINT VI.

A DEFENDANT, ADMITTEDLY SERVED WITH PROCESS AND BEFORE THE COURT, IS NOT DEPRIVED OF DUE PROCESS BECAUSE OF THE FAILURE OF THE COURT, UPON THE ENTRY OF A DEFAULT JUDGMENT, TO HEAR EVIDENCE.

The Circuit Court in the instant case holds that the failure of the Court rendering the judgment sued upon to hear evidence deprived defendant of "due process of law." This Court in a long line of decisions interpreting the due process clause has not required that a party be heard, but rather only that he be given "an opportunity to be heard as to all defenses only at some stage of the action". 46 Columbia Law Review 637 (1946). Or, as stated by this Court in the case of *Grannis v. Ordean*, 58, 5. Ed. 1363, 1369 (1914), "The fundamental requisite of due process of law is the opportunity to be heard." The respondent admittedly was served with process and was before the Court, and was "chargeable with all subsequent steps in the cause down to and including the judgment." *Flanders v. Ostrom*, 187 N.E. 673 (Sup. Ct. of Indiana, 1933). Respondent knew that he was before the Court and was "chargeable with notice of all subsequent steps in the cause," including the fact that the Rules of the Court in which the case was pending required the attendance of all parties on the opening day of the term. Rule 9 of the Rules of the United States District Court for the District of Kansas. Respondent was not denied "an opportunity to be heard", but rather through his own negligent default after being advised of the withdrawal of his counsel, the Court rendering the judgment sued upon expressly so reciting in its judgment (R. 10), failed to present any defense which he might have.

In *United States v. Gayle*, 45 Fed. 107 (Dis. Ct. Eastern District of So. Carolina, 1891), the plaintiff brought suit on a default judgment. In answer to the denfendant's contention that she was not served or had any notice of the earlier suit, the Court pointed out as follows:

> "The principle is that, when a party has had his day in court and has been afforded the opportunity of a defense, the judgment settles all questions made, or which could have been made, pertaining to the issues. So long as such judgment remains unreversed, it is conclusive."

CONCLUSION

In holding that the failure of the United States District Court rendering the judgment sued upon in the instant case to give the Respondent three days' notice of the application for default judgment as required by Rule 55(b)(2) of the Federal Rules of Civil Procedure deprived Respondent of due process of law, the Circuit Court has rendered a decision in conflict with at least recent decisions of another Circuit Court of Appeals. In addition, the Circuit Court's decision in this respect is not in accord with the principles of law announced by this Court and the highest Courts of the various States.

The decision insofar as it holds that a judgment regular upon its face rendered by a United States District Court is subject to collateral attack when sued on in another Federal Court on the ground that the case was tried by the Court without a jury, and that the entry of a default judgment under such circumstances deprived the defaulting party of rights guaranteed by the Constitution, is "in conflict with the applicable decisions of this Court." In addition, the highest courts of the various States without exception have held that a defaulting party does not have a constitutional right to a trial jury, and that a judgment cannot be collaterally attacked on the ground that it was tried by the Court when it was properly triable by a jury, or vice versa.

This Court has not construed Rule 55 of the Federal Rules of Civil Procedure insofar as it pertains to the entry of a default judgment against a party who has appeared and answered, but who otherwise fails to defend the suit against him, failing to file any subsequent pleadings or to appear on the date when the case by the Rules of the Court was subject to trial. The Circuit Court of Appeals construed this Rule to mean that a default judgment could not be taken against a party who so appeared and answered, despite the fact that the party thereafter failed to defend the suit against him. Inferior Federal Courts heretofore, pursuant to the Federal Rules of Civil Procedure, have struck the answers of defend-

ants, thereafter entering default judgments against them, because of their failure to comply with the Rules of Court. This case thus involves an important question of Federal law which has not been decided by this Court, but which should be, especially in view of the confusion resulting from the instant decision.

It has long been the accepted and usual course of judicial proceedings in both the Federal and State Courts to treat an express recital in a judgment regular upon it face as conclusive, and not subject to impeachment by matters outside the record. Although the judgment sued upon in the instant case was regular upon its face, was rendered by a Court of general jurisdiction and contains an express recital that evidence was introduced and argument of counsel heard by the Court, the Circuit Court permitted the respondent to collaterally attack the judgment by going completely outside the record. The Court, then, contrary to the great weight of authority, held that the rendition of a default judgment without the hearing of evidence deprived respondent of due process of law and resulted in the judgment against him being void, and thus subject to a collateral attack.

An analysis of the opinion of the Circuit Court of Appeals in this case clearly shows four grounds upon which this Court is authorized to grant certiorari.

Respectfully submitted,

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May 23, 1949.

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No. [redacted] 88

In the
Supreme Court of the United States
OCTOBER TERM, A. D. [redacted] 1949

EDNA PEARL BAILEY,
Petitioner and Appellee Below,

v.

B. F. BASS,
Respondent and Appellant Below.

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent respectfully submits the following:

I.

The statement of the case made by petitioner (P-1 of Petition) is substantially correct, with the exception that his motion for judgment in the trial court expressly admitted, for the purpose of the motion, that all the allegations set out in the answer were true.

II.

The decision of the Circuit Court is not based upon any one procedural error, but is grounded upon the fundamental proposition that the original Kansas judgment is void because it was beyond the power and jurisdiction of the Court, being entered as a default, when no default existed, as shown by the admitted facts, and the recitation in the Kansas judgment showing that it was entered only because respondent's counsel had withdrawn from the case.

III.

The admitted facts show that respondent had appeared in the Kansas Court, duly filed his answer, and thereafter petitioner secured the entry of a judgment in a personal injury suit for unliquidated damages. No notice was given respondent of the application for judgment, no jury trial was had, although demand had been made for a jury, no evidence was introduced, no notice was given after judgment, respondent had no actual knowledge of the entry of the judgment, and had a good defense to the suit which he was given no opportunity to present, and he had no knowledge of the withdrawal of his counsel. The Circuit Court held that "this does not look like due process of law under the Constitution nor even like a judicial trial."

IV.

The Circuit Court did not err in holding the judgment void and therefor subject to collateral attack, because the Kansas proceeding was so devoid of judicial due process as to render the judgment beyond the judicial power of

the Court to enter, and was unconstitutional invasion of the property rights of respondent.

Authorities and Argument

Rule 35-B, Federal Rules of Civil Procedure, says, "if the party against whom judgment by default is sought has appeared in the action, he shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the Court to enter judgment or to carry it into effect it is necessary to take an account, or to determine the amount of damages, or to establish the truth of any averment by evidence, or to make an investigation of any other matter, the Court may conduct such hearings or order such references as it deems necessary and proper, and shall accord a right of trial by jury to the parties when and as required by any statute of the United States." All of the above provisions were ignored by the Kansas Court.

Authorities

"No Court has the Judicial Power to render a default judgment against a Defendant when he has an Answer on file." *Sanier v. Turner (Tex.), 33 S. W. p. 294.*

"A simple judgment by default cannot legally be taken where an Answer of Defendant is on file, the general denial of the Appellants being on file it was incumbent on the Appellees to prove liability as well as the amount of damages." *Pecos Ply Co. v. Harlan (Civil Appeals, Tex.), 117 S. W. pp. 1012-12.*

"A Judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another Jurisdiction, Due Process requires that no other Jurisdiction shall give effect, even as a matter of comity, to a Judgment elsewhere acquired without due process." See *Griffin v. Griffin, U. S. Sup. Ct., 90 L. Ed. 635, 327 U. S. 220.*

"In tort action upon unliquidated claim, Court is without power to enter default Judgment fixing amount of recovery without first hearing evidence; Judgment on pleadings in action on unliquidated claim and for exemplary damages without first hearing evidence is void." *Tippins v. Turben, Okla. Sup. Ct., 19 p. 605.*

"A Court to have jurisdiction to render a Judgment must have Jurisdiction of person and subject matter, and must have power to render the particular Judgment, otherwise all proceedings and the Judgment are void." *Texas Criminal Appeals, 187 S. W. (2d) 660, Reed v. State.*

The power of Court to act in a particular way is therefore an element of jurisdiction, and when a judgment of one state is relied on in the courts of a sister State, this is always a proper and necessary inquiry, as said by the following authorities:

"It is well settled that mere recitals of Jurisdiction are not conclusive, and that a Judgment of a sister state may be impeached for want of Jurisdiction, notwithstanding its recitals." *31 Am. Jur., p. 164.*

"A Judgment of a sister state is always open to impeachment on the ground of a want of Jurisdiction." *34 C. J., p. 1168.*

"Jurisdiction in a particular case is not only the power of the Court to hear and determine, but also the power to render the particular Judgment entered, and every act of the Court beyond its Jurisdiction is void." *Words and Phrases, Vol. 23, p. 380,* and cases cited.

The petitioner in this case, by his conduct in the method of securing the Kansas Judgment and remaining silent thereafter for a period of nearly two years, until filing the suit in Texas, thereby perpetrated a fraud upon respondent, which he now asks this Court to uphold; to sustain the petitioner's contentions in this case, would be putting the stamp of approval upon a rank injustice, and turn our courts into instruments of oppression, bound by no rules, and giving no protection or relief to citizens who have been injured because of an abuse of judicial power. The Due Process clause of the Constitution makes no exceptions, and court and judges are bound by their oaths to uphold and enforce said Due Process clause. Must a citizen of Texas, sued in a distant state, far from his home, move to the Court where the suit is filed, and there keep a constant and continuous watch to see that no action is taken against him without his knowledge? Doesn't he have the right to rely on the Court to follow the law and take no action without proper notice, and to enter no judgments except in the manner prescribed by law? The Kansas Court entered a default judgment when there was no default, a

mere withdrawal of an attorney from a suit not creating a default.

We respectfully submit that the Kansas Judgment is void, that the Circuit Court correctly so held, and pray that its judgment be in all things affirmed.

Respectfully submitted,

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McKinney, Texas,
Attorney for Respondent.